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# POLICYHOLDER INSURANCE COVERAGE E-UPDATE

## YET ANOTHER REASON NOT TO RELY ON CERTIFICATES OF INSURANCE

By Henry L. Goldberg & Mitchell B. Reiter

AUGUST 2012

We have previously discussed the dangers of relying upon a Certificate of Insurance as proof that required insurance coverage is being provided to an upstream, additional insured party as specified by a trade contract. A recent decision from the New York State Court of Appeals (New York's highest court) provides still further reason to demand for review a complete copy of all policies of liability insurance from any entity contractually required to provide you with coverage.

In this recent case, a subcontractor ("Sub") was performing work on a luxury high-rise condominium on Manhattan's Upper East Side. A tower crane that was operated by the Sub collapsed, causing seven deaths. Dozens of others were injured and a nearby building was destroyed. The crane rigger was charged with multiple counts of criminally negligent homicide and manslaughter. He was eventually found not guilty of all charges in July, 2010. Nonetheless, many lawsuits for personal injuries and property damage proceeded.

The Sub was insured under a commercial general liability ("CGL") insurance policy with liability limits of $1 million per occurrence and $2 million aggregate. The Sub also was insured by an excess liability ("excess") insurance policy, with liability limits of $9 million, issued by Admiral Insurance Co. ("Admiral").

The Sub's trade contract with the general contractor ("GC") required it to name the GC and the property's owner under its policies as additional insureds. The Sub properly obtained such additional insured coverage under both its CGL and excess policies. However, the excess policy, incredibly, also contained an exclusion for residential construction activities.

Following the crane collapse, the owner and GC (as additional insureds) sought coverage under the policies issued to the Sub. However, the excess carrier's investigation revealed that the Sub had claimed in its application for insurance coverage that it was a drywall installer that did not perform any exterior work. In fact, the Sub was performing the concrete work on the project. Consequently, the excess carrier denied coverage to the owner and GC on several grounds. One of those grounds was the Sub's alleged material misrepresentation of the nature of its work on its application for coverage. Another ground was the residential construction activities exclusion.

The excess carrier filed a declaratory judgment action seeking to completely rescind its coverage. It sought to avoid any responsibility for the claims of personal injury and property damage that arose out of the crane collapse.

The lower courts refused to grant the excess carrier's request for a declaratory judgment, reasoning that the wrongful and misleading actions of the named insured (Sub) did not relieve the insurer of its obligations and duties to "innocent" additional insureds (owner and GC). Additional insureds in New York generally have the same rights as any other insured under policies. Issues regarding coverage, exclusions, disclaimers, etc. must be examined and resolved separately for each insured, named or additional.

Nonetheless, the Court of Appeals, making "new law," reversed the lower courts' decisions and concluded that the excess carrier had a right to deny coverage to the additional insureds based upon the Sub's (named insured/policyholder) wrongful and misleading actions. Up until this time,

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additional insureds had never been barred from coverage by virtue of a named insured's misrepresentations.

The Court of Appeals reasoned that the excess carrier had issued its policy to the Sub based upon the belief that it was providing coverage for the limited risks associated with interior drywall installation. Accordingly, the Court of Appeals agreed with the excess carrier's argument that it only contemplated liability to additional insureds concerning its named insured's interior drywall activities, which is a fundamentally different set of risks than those associated with structural concrete work. The Court of Appeals ultimately found that "[the excess carrier] evaluated the risk of, and collected a premium for, providing excess insurance for interior drywall installation, not the obviously much greater risk presented by exterior construction work with a tower crane many stories above grade."

The result was that neither the GC nor the owner had any additional insured coverage under the Sub's policy despite the terms of the subcontract.

**G&C Commentary**

This is a significant change. Nonetheless, the troublesome consequences suffered by the upstream parties could have been completely avoided had the GC and/or owner reviewed the Sub's entire insurance policy prior to award or, at least, prior to the commencement of work. Reviewing the actual policies would have revealed the residential construction exclusion, as well as the Sub's egregious misrepresentation of its activities (i.e., only performing the less risk-producing indoor drywall installation). Now, more than ever, it is crucial that the policies of all parties who are contractually required to provide coverage are fully reviewed. No certificate of insurance could have possibly provided the necessary protections in this case.